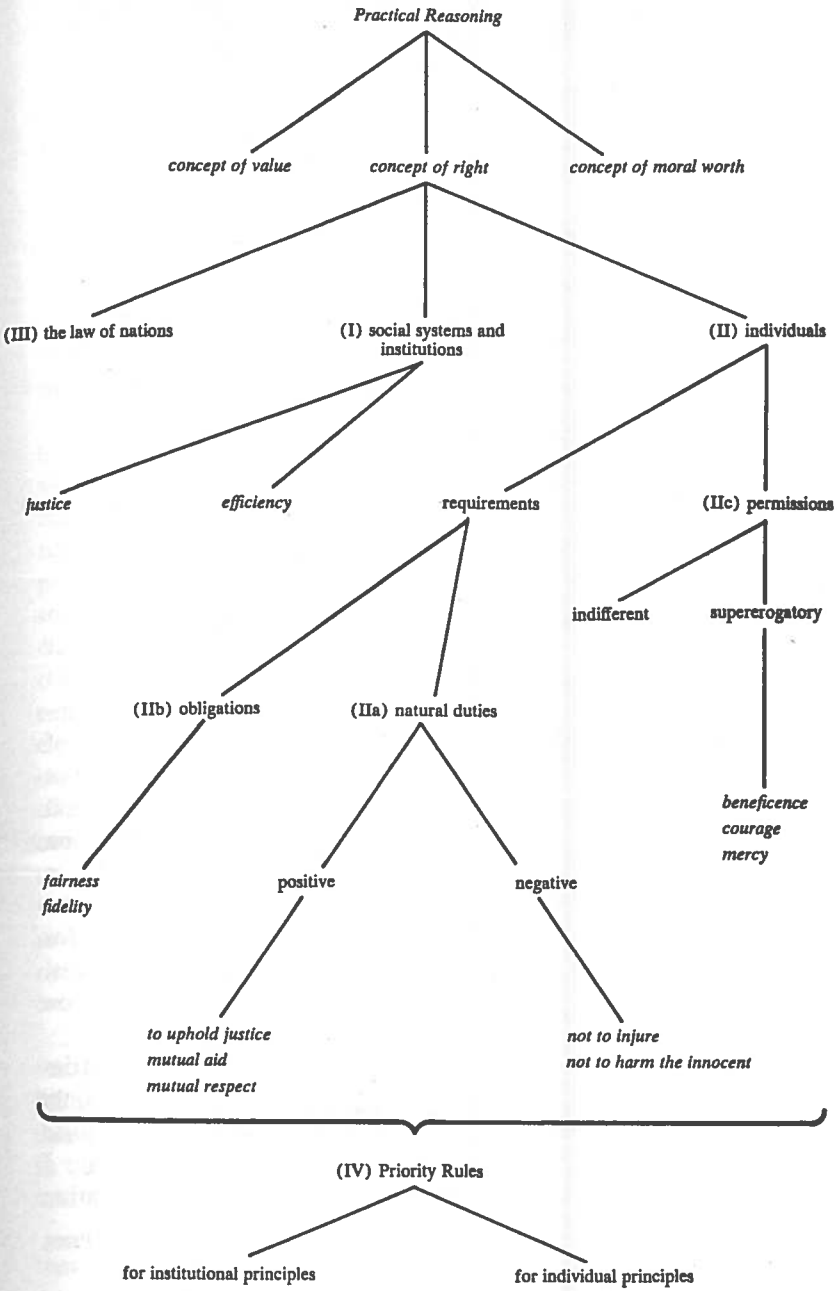
it is also in the interest of each to have greater natural assets. This enables him to pursue a preferred plan of life. In the original position, then, the parties want to insure for their descendants the best genetic endowment (assuming their own to be fixed). The pursuit of reasonable policies in this regard is something that earlier generations owe to later ones, this being a question that arises between generations. Thus over time a society is to take steps at least to preserve the general level of natural abilities and to prevent the diffusion of serious defects. These measures are to be guided by principles that the parties would be willing to consent to for the sake of their successors. I mention this speculative and difficult matter to indicate once again the manner in which the difference principle is likely to transform problems of social justice. We might conjecture that in the long run, if there is an upper bound on ability, we would eventually reach a society with the greatest equal liberty the members of which enjoy the greatest equal talent. But I shall not pursue this thought further.

18. PRINCIPLES FOR INDIVIDUALS: THE PRINCIPLE OF FAIRNESS

In the discussion so far I have considered the principles which apply to institutions or, more exactly, to the basic structure of society. It is clear, however, that principles of another kind must also be chosen, since a complete theory of right includes principles for individuals as well. In fact, as the accompanying diagram indicates, one needs in addition principles for the law of nations and of course priority rules for assigning weights when principles conflict. I shall not take up the principles for the law of nations, except in passing (§ 58); nor shall I attempt any systematic discussion of the principles for individuals. But certain principles of this type are an essential part of any theory of justice. In this and the next section the meaning of several of these principles is explained, although the examination of the reasons for choosing them is postponed until later (§§ 51–52).

The accompanying diagram is purely schematic. It is not suggested that the principles associated with the concepts lower down



in the tree are deduced from the higher ones. The diagram simply indicates the kinds of principles that must be chosen before a full conception of right is on hand. The Roman numerals express the order in which the various sorts of principles are to be acknowledged in the original position. Thus the principles for the basic structure of society are to be agreed to first, principles for individuals next, followed by those for the law of nations. Last of all the priority rules are adopted, although we may tentatively choose these earlier contingent on subsequent revision.

Now the order in which principles are chosen raises a number of questions which I shall skip over. The important thing is that the various principles are to be adopted in a definite sequence and the reasons for this ordering are connected with the more difficult parts of the theory of justice. To illustrate: while it would be possible to choose many of the natural duties before those for the basic structure without changing the principles in any substantial way, the sequence in either case reflects the fact that obligations presuppose principles for social forms. And some natural duties also presuppose such principles, for example, the duty to support just institutions. For this reason it seems simpler to adopt all principles for individuals after those for the basic structure. That principles for institutions are chosen first shows the social nature of the virtue of justice, its intimate connection with social practices so often noted by idealists. When Bradley says that the individual is a bare abstraction, he can be interpreted to say, without too much distortion, that a person's obligations and duties presuppose a moral conception of institutions and therefore that the content of just institutions must be defined before the requirements for individuals can be set out.[25] And this is to say that, in most cases, the principles for obligations and duties should be settled upon after those for the basic structure.

Therefore, to establish a complete conception of right, the parties in the original position are to choose in a definite order not only a conception of justice but also principles to go with each major concept falling under the concept of right. These concepts are I assume relatively few in number and have a determinate relation

25. See F. H. Bradley, *Ethical Studies*, 2nd ed. (Oxford, The Clarendon Press, 1927), pp. 163–189.

to each other. Thus, in addition to principles for institutions there must be an agreement on principles for such notions as fairness and fidelity, mutual respect and beneficence as these apply to individuals, as well as on principles for the conduct of states. The intuitive idea is this: the concept of something's being right is the same as, or better, may be replaced by, the concept of its being in accordance with the principles that in the original position would be acknowledged to apply to things of its kind. I do not interpret this concept of right as providing an analysis of the meaning of the term "right" as normally used in moral contexts. It is not meant as an analysis of the concept of right in the traditional sense. Rather, the broader notion of rightness as fairness is to be understood as a replacement for existing conceptions. There is no necessity to say that sameness of meaning holds between the word "right" (and its relatives) in its ordinary use and the more elaborate locutions needed to express this ideal contractarian concept of right. For our purposes here I accept the view that a sound analysis is best understood as providing a satisfactory substitute, one that meets certain desiderata while avoiding certain obscurities and confusions. In other words, explication is elimination: we start with a concept the expression for which is somehow troublesome; but it serves certain ends that cannot be given up. An explication achieves these ends in other ways that are relatively free of difficulty.[26] Thus if the theory of justice as fairness, or more generally of rightness as fairness, fits our considered judgments in reflective equilibrium, and if it enables us to say all that on due examination we want to say, then it provides a way of eliminating customary phrases in favor of other expressions. So understood one may think of justice as fairness and rightness as fairness as providing a definition or explication of the concepts of justice and right.

I now turn to one of the principles that applies to individuals, the principle of fairness. I shall try to use this principle to account for all requirements that are obligations as distinct from natural duties. This principle holds that a person is required to do his part as defined by the rules of an institution when two conditions are met: first, the institution is just (or fair), that is, it satisfies the two

26. See W. V. Quine, *Word and Object* (Cambridge, Mass., M.I.T. Press, 1960), pp. 257–262, whom I follow here.

principles of justice; and second, one has voluntarily accepted the benefits of the arrangement or taken advantage of the opportunities it offers to further one's interests. The main idea is that when a number of persons engage in a mutually advantageous cooperative venture according to rules, and thus restrict their liberty in ways necessary to yield advantages for all, those who have submitted to these restrictions have a right to a similar acquiescence on the part of those who have benefited from their submission.[27] We are not to gain from the cooperative labors of others without doing our fair share. The two principles of justice define what is a fair share in the case of institutions belonging to the basic structure. So if these arrangements are just, each person receives a fair share when all (himself included) do their part.

Now by definition the requirements specified by the principle of fairness are the obligations. All obligations arise in this way. It is important, however, to note that the principle of fairness has two parts, the first which states that the institutions or practices in question must be just, the second which characterizes the requisite voluntary acts. The first part formulates the conditions necessary if these voluntary acts are to give rise to obligations. By the principle of fairness it is not possible to be bound to unjust institutions, or at least to institutions which exceed the limits of tolerable injustice (so far undefined). In particular, it is not possible to have an obligation to autocratic and arbitrary forms of government. The necessary background does not exist for obligations to arise from consensual or other acts, however expressed. Obligatory ties presuppose just institutions, or ones reasonably just in view of the circumstances. It is, therefore, a mistake to argue against justice as fairness and contract theories generally that they have the consequence that citizens are under an obligation to unjust regimes which coerce their consent or win their tacit acquiescence in more refined ways. Locke especially has been the object of this mistaken criticism which overlooks the necessity for certain background conditions.[28]

27. I am indebted here to H. L. A. Hart, "Are There Any Natural Rights?" *Philosophical Review*, vol. 64 (1955), pp. 185f.

28. Locke holds that conquest gives no right, nor does violence and injury however much "colored with the name, pretences, or forms of law." *Second*

There are several characteristic features of obligations which distinguish them from other moral requirements. For one thing, they arise as a result of our voluntary acts; these acts may be the giving of express or tacit undertakings, such as promises and agreements, but they need not be, as in the case of accepting benefits. Further, the content of obligations is always defined by an institution or practice the rules of which specify what it is that one is required to do. And finally, obligations are normally owed to definite individuals, namely, those who are cooperating together to maintain the arrangement in question.[29] As an example illustrating these features, consider the political act of running for and (if successful) holding public office in a constitutional regime. This act gives rise to the obligation to fulfill the duties of office, and these duties determine the content of the obligation. Here I think of duties not as moral duties but as tasks and responsibilities assigned to certain institutional positions. It is nevertheless the case that one may have a moral reason (one based on a moral principle) for discharging these duties, as when one is bound to do so by the principle of fairness. Also, one who assumes public office is obligated to his fellow citizens whose trust and confidence he has sought and with whom he is cooperating in running a democratic society. Similarly, we assume obligations when we marry as well as when we accept positions of judicial, administrative, or other authority. We acquire obligations by promising and by tacit understandings, and even when we join a game, namely, the obligation to play by the rules and to be a good sport.

All of these obligations are, I believe, covered by the principle of fairness. There are two important cases though that are somewhat problematical, namely, political obligation as it applies to

Treatise of Government, pars. 176, 20. See Hanna Pitkin's discussion of Locke in "Obligation and Consent I," *American Political Science Review*, vol. 59 (1965), esp. pp. 994–997, the essentials of which I accept.

29. In distinguishing between obligations and natural duties I have drawn upon H. L. A. Hart, "Legal and Moral Obligation," in *Essays in Moral Philosophy*, ed. by A. I. Melden (Seattle, University of Washington Press, 1958), pp. 100–105; C. H. Whiteley, "On Duties," *Proceedings of the Aristotelian Society*, vol. 53 (1952–53); and R. B. Brandt, "The Concepts of Obligation and Duty," *Mind*, vol. 73 (1964).

the average citizen, rather than, say, to those who hold office, and the obligation to keep promises. In the first case it is not clear what is the requisite binding action or who has performed it. There is, I believe, no political obligation, strictly speaking, for citizens generally. In the second case an explanation is needed as to how fiduciary obligations arise from taking advantage of a just practice. We need to look into the nature of the relevant practice in this instance. These matters I shall discuss at another place (§§51–52).

19. PRINCIPLES FOR INDIVIDUALS: THE NATURAL DUTIES

Whereas all obligations are accounted for by the principle of fairness, there are many natural duties, positive and negative. I shall make no attempt to bring them under one principle. Admittedly this lack of unity runs the risk of putting too much strain on priority rules, but I shall have to leave this difficulty aside. The following are examples of natural duties: the duty of helping another when he is in need or jeopardy, provided that one can do so without excessive risk or loss to oneself; the duty not to harm or injure another; and the duty not to cause unnecessary suffering. The first of these duties, the duty of mutual aid, is a positive duty in that it is a duty to do something good for another; whereas the last two duties are negative in that they require us not to do something that is bad. The distinction between positive and negative duties is intuitively clear in many cases, but often gives way. I shall not put any stress upon it. The distinction is important only in connection with the priority problem, since it seems plausible to hold that, when the distinction is clear, negative duties have more weight than positive ones. But I shall not pursue this question here.

Now in contrast with obligations, it is characteristic of natural duties that they apply to us without regard to our voluntary acts. Moreover, they have no necessary connection with institutions or social practices; their content is not, in general, defined by the rules of these arrangements. Thus we have a natural duty not to be cruel, and a duty to help another, whether or not we have com-

mitted ourselves to these actions. It is no defense or excuse to say that we have made no promise not to be cruel or vindictive, or to come to another's aid. Indeed, a promise not to kill, for example, is normally ludicrously redundant, and the suggestion that it establishes a moral requirement where none already existed is mistaken. Such a promise is in order, if it ever is so, only when for special reasons one has the right to kill, perhaps in a situation arising in a just war. A further feature of natural duties is that they hold between persons irrespective of their institutional relationships; they obtain between all as equal moral persons. In this sense the natural duties are owed not only to definite individuals, say to those cooperating together in a particular social arrangement, but to persons generally. This feature in particular suggests the propriety of the adjective "natural." One aim of the law of nations is to assure the recognition of these duties in the conduct of states. This is especially important in constraining the means used in war, assuming that, in certain circumstances anyway, wars of self-defense are justified (§ 58).

From the standpoint of justice as fairness, a fundamental natural duty is the duty of justice. This duty requires us to support and to comply with just institutions that exist and apply to us. It also constrains us to further just arrangements not yet established, at least when this can be done without too much cost to ourselves. Thus if the basic structure of society is just, or as just as it is reasonable to expect in the circumstances, everyone has a natural duty to do his part in the existing scheme. Each is bound to these institutions independent of his voluntary acts, performative or otherwise. Thus even though the principles of natural duty are derived from a contractarian point of view, they do not presuppose an act of consent, express or tacit, or indeed any voluntary act, in order to apply. The principles that hold for individuals, just as the principles for institutions, are those that would be acknowledged in the original position. These principles are understood as the outcome of a hypothetical agreement. If their formulation shows that no binding action, consensual or otherwise, is a presupposition of their application, then they apply unconditionally. The reason why obligations depend upon voluntary acts is given by the second part

of the principle of fairness which states this condition. It has nothing to do with the contractual nature of justice as fairness.[80] In fact, once the full set of principles, a complete conception of right, is on hand, we can simply forget about the conception of original position and apply these principles as we would any others.

There is nothing inconsistent, or even surprising, in the fact that justice as fairness allows unconditional principles. It suffices to show that the parties in the original position would agree to principles defining the natural duties which as formulated hold unconditionally. We should note that, since the principle of fairness may establish a bond to existing just arrangements, the obligations covered by it can support a tie already present that derives from the natural duty of justice. Thus a person may have both a natural duty and an obligation to comply with an institution and to do his part. The thing to observe here is that there are several ways in which one may be bound to political institutions. For the most part the natural duty of justice is the more fundamental, since it binds citizens generally and requires no voluntary acts in order to apply. The principle of fairness, on the other hand, binds only those who assume public office, say, or those who, being better situated, have advanced their aims within the system. There is, then, another sense of *noblesse oblige:* namely, that those who are more privileged are likely to acquire obligations tying them even more strongly to a just scheme.

I shall say very little about the other kind of principles for individuals. For while permissions are not an unimportant class of actions, I must limit the discussion to the theory of social justice. It may be observed, though, that once all the principles defining requirements are chosen, no further acknowledgments are necessary to define permissions. This is so because permissions are those acts

30. For clarification on these points I am indebted to Robert Amdur. Views seeking to derive political ties solely from consensual acts are found in Michael Walzer, *Obligations: Essays on Disobedience, War, and Citizenship* (Cambridge, Mass., Harvard University Press, 1970), esp. pp. ix–xvi, 7–10, 18–21, and ch. 5; and Joseph Tussman, *Obligation and the Body Politic* (New York, Oxford University Press, 1960). On the latter, see Hanna Pitkin, "Obligation and Consent I," pp. 997f. For further discussions of the problems of consent theory in addition to Pitkin, see Alan Gewirth, "Political Justice." in *Social Justice,* ed. R. B. Brandt (Englewood Cliffs, N.J., Prentice-Hall, Inc., 1962), pp. 128–141; and J. P. Plamenatz, *Consent, Freedom, and Political Obligation,* 2nd ed. (London, Oxford University Press, 1968).

which we are at liberty both to do and not to do. They are acts which violate no obligation or natural duty. In studying permissions one wishes to single out those that are significant from a moral point of view and to explain their relation to duties and obligations. Many such actions are morally indifferent or trivial. But among permissions is the interesting class of supererogatory actions. These are acts of benevolence and mercy, of heroism and self-sacrifice. It is good to do these actions but it is not one's duty or obligation. Supererogatory acts are not required, though normally they would be were it not for the loss or risk involved for the agent himself. A person who does a supererogatory act does not invoke the exemption which the natural duties allow. For while we have a natural duty to bring about a great good, say, if we can do so relatively easily, we are released from this duty when the cost to ourselves is considerable. Supererogatory acts raise questions of first importance for ethical theory. For example, it seems offhand that the classical utilitarian view cannot account for them. It would appear that we are bound to perform actions which bring about a greater good for others whatever the cost to ourselves provided that the sum of advantages altogether exceeds that of other acts open to us. There is nothing corresponding to the exemptions included in the formulation of the natural duties. Thus some of the actions which justice as fairness counts as supererogatory may be required by the utility principle. I shall not, however, pursue this matter further. Supererogatory acts are mentioned here for the sake of completeness. We must now turn to the interpretation of the initial situation.

principles of justice. Sometimes however these principles are not clear or definite as to what they require. This is not always because the evidence is complicated and ambiguous, or difficult to survey and assess. The nature of the principles themselves may leave open a range of options rather than singling out any particular alternative. The rate of savings, for example, is specified only within certain limits; the main idea of the just savings principle is to exclude certain extremes. Eventually in applying the difference principle we wish to include in the prospects of the least advantaged the primary good of self-respect; and there are a variety of ways of taking account of this value consistent with the difference principle. How heavily this good and others related to it should count in the index is to be decided in view of the general features of the particular society and by what it is rational for its least favored members to want as seen from the legislative stage. In such cases as these, then, the principles of justice set up a certain range within which the rate of savings or the emphasis given to self-respect should lie. But they do not say where in this range the choice should fall.

Now for these situations the principle of political settlement applies: if the law actually voted is, so far as one can ascertain, within the range of those that could reasonably be favored by rational legislators conscientiously trying to follow the principles of justice, then the decision of the majority is practically authoritative, though not definitive. The situation is one of quasi-pure procedural justice. We must rely on the actual course of discussion at the legislative stage to select a policy within the allowed bounds. These cases are not instances of pure procedural justice because the outcome does not literally define the right result. It is simply that those who disagree with the decision made cannot convincingly establish their point within the framework of the public conception of justice. The question is one that cannot be sharply defined. In practice political parties will no doubt take different stands on these kinds of issues. The aim of constitutional design is to make sure, if possible, that the self-interest of social classes does not so distort the political settlement that it is made outside the permitted limits.

55. THE DEFINITION OF CIVIL DISOBEDIENCE

I now wish to illustrate the content of the principles of natural duty and obligation by sketching a theory of civil disobedience. As I have already indicated, this theory is designed only for the special case of a nearly just society, one that is well-ordered for the most part but in which some serious violations of justice nevertheless do occur. Since I assume that a state of near justice requires a democratic regime, the theory concerns the role and the appropriateness of civil disobedience to legitimately established democratic authority. It does not apply to the other forms of government nor, except incidentally, to other kinds of dissent or resistance. I shall not discuss this mode of protest, along with militant action and resistance, as a tactic for transforming or even overturning an unjust and corrupt system. There is no difficulty about such action in this case. If any means to this end are justified, then surely nonviolent opposition is justified. The problem of civil disobedience, as I shall interpret it, arises only within a more or less just democratic state for those citizens who recognize and accept the legitimacy of the constitution. The difficulty is one of a conflict of duties. At what point does the duty to comply with laws enacted by a legislative majority (or with executive acts supported by such a majority) cease to be binding in view of the right to defend one's liberties and the duty to oppose injustice? This question involves the nature and limits of majority rule. For this reason the problem of civil disobedience is a crucial test case for any theory of the moral basis of democracy.

A constitutional theory of civil disobedience has three parts. First, it defines this kind of dissent and separates it from other forms of opposition to democratic authority. These range from legal demonstrations and infractions of law designed to raise test cases before the courts to militant action and organized resistance. A theory specifies the place of civil disobedience in this spectrum of possibilities. Next, it sets out the grounds of civil disobedience and the conditions under which such action is justified in a (more or less) just democratic regime. And finally, a theory should explain the role of civil disobedience within a constitutional system and

account for the appropriateness of this mode of protest within a free society.

Before I take up these matters, a word of caution. We should not expect too much of a theory of civil disobedience, even one framed for special circumstances. Precise principles that straightway decide actual cases are clearly out of the question. Instead, a useful theory defines a perspective within which the problem of civil disobedience can be approached; it identifies the relevant considerations and helps us to assign them their correct weights in the more important instances. If a theory about these matters appears to us, on reflection, to have cleared our vision and to have made our considered judgments more coherent, then it has been worthwhile. The theory has done what, for the present, one may reasonably expect it to do: namely, to narrow the disparity between the conscientious convictions of those who accept the basic principles of a democratic society.

I shall begin by defining civil disobedience as a public, nonviolent, conscientious yet political act contrary to law usually done with the aim of bringing about a change in the law or policies of the government.[19] By acting in this way one addresses the sense of justice of the majority of the community and declares that in one's considered opinion the principles of social cooperation among free and equal men are not being respected. A preliminary gloss on this definition is that it does not require that the civilly disobedient act breach the same law that is being protested.[20] It allows for what

19. Here I follow H. A. Bedau's definition of civil disobedience. See his "On Civil Disobedience," *Journal of Philosophy*, vol. 58 (1961), pp. 653–661. It should be noted that this definition is narrower than the meaning suggested by Thoreau's essay, as I note in the next section. A statement of a similar view is found in Martin Luther King's "Letter from Birmingham City Jail" (1963), reprinted in H. A. Bedau, ed., *Civil Disobedience* (New York, Pegasus, 1969), pp. 72–89. The theory of civil disobedience in the text tries to set this sort of conception into a wider framework. Some recent writers have also defined civil disobedience more broadly. For example, Howard Zinn, *Disobedience and Democracy* (New York, Random House, 1968), pp. 119f, defines it as "the deliberate, discriminate violation of law for a vital social purpose." I am concerned with a more restricted notion. I do not at all mean to say that only this form of dissent is ever justified in a democratic state.

20. This and the following gloss are from Marshall Cohen, "Civil Disobedience in a Constitutional Democracy," *The Massachusetts Review*, vol. 10 (1969), pp. 224–226, 218–221, respectively.

some have called indirect as well as direct civil disobedience. And this a definition should do, as there are sometimes strong reasons for not infringing on the law or policy held to be unjust. Instead, one may disobey traffic ordinances or laws of trespass as a way of presenting one's case. Thus, if the government enacts a vague and harsh statute against treason, it would not be appropriate to commit treason as a way of objecting to it, and in any event, the penalty might be far more than one should reasonably be ready to accept. In other cases there is no way to violate the government's policy directly, as when it concerns foreign affairs, or affects another part of the country. A second gloss is that the civilly disobedient act is indeed thought to be contrary to law, at least in the sense that those engaged in it are not simply presenting a test case for a constitutional decision; they are prepared to oppose the statute even if it should be upheld. To be sure, in a constitutional regime, the courts may finally side with the dissenters and declare the law or policy objected to unconstitutional. It often happens, then, that there is some uncertainty as to whether the dissenters' action will be held illegal or not. But this is merely a complicating element. Those who use civil disobedience to protest unjust laws are not prepared to desist should the courts eventually disagree with them, however pleased they might have been with the opposite decision.

It should also be noted that civil disobedience is a political act not only in the sense that it is addressed to the majority that holds political power, but also because it is an act guided and justified by political principles, that is, by the principles of justice which regulate the constitution and social institutions generally. In justifying civil disobedience one does not appeal to principles of personal morality or to religious doctrines, though these may coincide with and support one's claims; and it goes without saying that civil disobedience cannot be grounded solely on group or self-interest. Instead one invokes the commonly shared conception of justice that underlies the political order. It is assumed that in a reasonably just democratic regime there is a public conception of justice by reference to which citizens regulate their political affairs and interpret the constitution. The persistent and deliberate violation of the basic principles of this conception over any extended period

of time, especially the infringement of the fundamental equal liberties, invites either submission or resistance. By engaging in civil disobedience a minority forces the majority to consider whether it wishes to have its actions construed in this way, or whether, in view of the common sense of justice, it wishes to acknowledge the legitimate claims of the minority.

A further point is that civil disobedience is a public act. Not only is it addressed to public principles, it is done in public. It is engaged in openly with fair notice; it is not covert or secretive. One may compare it to public speech, and being a form of address, an expression of profound and conscientious political conviction, it takes place in the public forum. For this reason, among others, civil disobedience is nonviolent. It tries to avoid the use of violence, especially against persons, not from the abhorrence of the use of force in principle, but because it is a final expression of one's case. To engage in violent acts likely to injure and to hurt is incompatible with civil disobedience as a mode of address. Indeed, any interference with the civil liberties of others tends to obscure the civilly disobedient quality of one's act. Sometimes if the appeal fails in its purpose, forceful resistance may later be entertained. Yet civil disobedience is giving voice to conscientious and deeply held convictions; while it may warn and admonish, it is not itself a threat.

Civil disobedience is nonviolent for another reason. It expresses disobedience to law within the limits of fidelity to law, although it is at the outer edge thereof.[21] The law is broken, but fidelity to law is expressed by the public and nonviolent nature of the act, by the willingness to accept the legal consequences of one's conduct.[22] This fidelity to law helps to establish to the majority that the act is

21. For a fuller discussion of this point, see Charles Fried, "Moral Causation," *Harvard Law Review*, vol. 77 (1964), pp. 1268f. For clarification below of the notion of militant action, I am indebted to Gerald Loev.

22. Those who define civil disobedience more broadly might not accept this description. See, for example, Zinn, *Disobedience and Democracy*, pp. 27–31, 39, 119f. Moreover he denies that civil disobedience need be nonviolent. Certainly one does not accept the punishment as right, that is, as deserved for an unjustified act. Rather one is willing to undergo the legal consequences for the sake of fidelity to law, which is a different matter. There is room for latitude here in that the definition allows that the charge may be contested in court, should this prove appropriate. But there comes a point beyond which dissent ceases to be civil disobedience as defined here.

indeed politically conscientious and sincere, and that it is intended to address the public's sense of justice. To be completely open and nonviolent is to give bond of one's sincerity, for it is not easy to convince another that one's acts are conscientious, or even to be sure of this before oneself. No doubt it is possible to imagine a legal system in which conscientious belief that the law is unjust is accepted as a defense for noncompliance. Men of great honesty with full confidence in one another might make such a system work. But as things are, such a scheme would presumably be unstable even in a state of near justice. We must pay a certain price to convince others that our actions have, in our carefully considered view, a sufficient moral basis in the political convictions of the community.

Civil disobedience has been defined so that it falls between legal protest and the raising of test cases on the one side, and conscientious refusal and the various forms of resistance on the other. In this range of possibilities it stands for that form of dissent at the boundary of fidelity to law. Civil disobedience, so understood, is clearly distinct from militant action and obstruction; it is far removed from organized forcible resistance. The militant, for example, is much more deeply opposed to the existing political system. He does not accept it as one which is nearly just or reasonably so; he believes either that it departs widely from its professed principles or that it pursues a mistaken conception of justice altogether. While his action is conscientious in its own terms, he does not appeal to the sense of justice of the majority (or those having effective political power), since he thinks that their sense of justice is erroneous, or else without effect. Instead, he seeks by well-framed militant acts of disruption and resistance, and the like, to attack the prevalent view of justice or to force a movement in the desired direction. Thus the militant may try to evade the penalty, since he is not prepared to accept the legal consequences of his violation of the law; this would not only be to play into the hands of forces that he believes cannot be trusted, but also to express a recognition of the legitimacy of the constitution to which he is opposed. In this sense militant action is not within the bounds of fidelity to law, but represents a more profound opposition to the legal order. The basic structure is thought to be so unjust or else to depart so widely from

its own professed ideals that one must try to prepare the way for radical or even revolutionary change. And this is to be done by trying to arouse the public to an awareness of the fundamental reforms that need to be made. Now in certain circumstances militant action and other kinds of resistance are surely justified. I shall not, however, consider these cases. As I have said, my aim here is the limited one of defining a concept of civil disobedience and understanding its role in a nearly just constitutional regime.

56. THE DEFINITION OF CONSCIENTIOUS REFUSAL

Although I have distinguished civil disobedience from conscientious refusal, I have yet to explain the latter notion. This will now be done. It must be recognized, however, that to separate these two ideas is to give a narrower definition to civil disobedience than is traditional; for it is customary to think of civil disobedience in a broader sense as any noncompliance with law for conscientious reasons, at least when it is not covert and does not involve the use of force. Thoreau's essay is characteristic, if not definitive, of the traditional meaning.[23] The usefulness of the narrower sense will, I believe, be clear once the definition of conscientious refusal is examined.

Conscientious refusal is noncompliance with a more or less direct legal injunction or administrative order. It is refusal since an order is addressed to us and, given the nature of the situation, whether we accede to it is known to the authorities. Typical examples are the refusal of the early Christians to perform certain acts of piety prescribed by the pagan state, and the refusal of the Jehovah's Witnesses to salute the flag. Other examples are the unwillingness of a pacifist to serve in the armed forces, or of a soldier to obey an order that he thinks is manifestly contrary to the moral law as it applies to war. Or again, in Thoreau's case, the refusal to pay a tax on the grounds that to do so would make him an agent of grave injustice to another. One's action is assumed to be

23. See Henry David Thoreau, "Civil Disobedience" (1848), reprinted in H. A. Bedau, ed., *Civil Disobedience*, pp. 27–48. For a critical discussion, see Bedau's remarks, pp. 15–26.

known to the authorities, however much one might wish, in some cases, to conceal it. Where it can be covert, one might speak of conscientious evasion rather than conscientious refusal. Covert infractions of a fugitive slave law are instances of conscientious evasion.[24]

There are several contrasts between conscientious refusal (or evasion) and civil disobedience. First of all, conscientious refusal is not a form of address appealing to the sense of justice of the majority. To be sure, such acts are not generally secretive or covert, as concealment is often impossible anyway. One simply refuses on conscientious grounds to obey a command or to comply with a legal injunction. One does not invoke the convictions of the community, and in this sense conscientious refusal is not an act in the public forum. Those ready to withhold obedience recognize that there may be no basis for mutual understanding; they do not seek out occasions for disobedience as a way to state their cause. Rather, they bide their time hoping that the necessity to disobey will not arise. They are less optimistic than those undertaking civil disobedience and they may entertain no expectation of changing laws or policies. The situation may allow no time for them to make their case, or again there may not be any chance that the majority will be receptive to their claims.

Conscientious refusal is not necessarily based on political principles; it may be founded on religious or other principles at variance with the constitutional order. Civil disobedience is an appeal to a commonly shared conception of justice, whereas conscientious refusal may have other grounds. For example, assuming that the early Christians would not justify their refusal to comply with the religious customs of the Empire by reasons of justice but simply as being contrary to their religious convictions, their argument would not be political; nor, with similar qualifications, are the views of a pacifist, assuming that wars of self-defense at least are recognized by the conception of justice that underlies a constitutional regime. Conscientious refusal may, however, be grounded on political principles. One many decline to go along with a law thinking that it is so unjust that complying with it is simply out of the question. This would be the case if, say, the law were to enjoin

24. For these distinctions I am indebted to Burton Dreben.

our being the agent of enslaving another, or to require us to submit to a similar fate. These are patent violations of recognized political principles.

It is a difficult matter to find the right course when some men appeal to religious principles in refusing to do actions which, it seems, are required by principles of political justice. Does the pacifist possess an immunity from military service in a just war, assuming that there are such wars? Or is the state permitted to impose certain hardships for noncompliance? There is a temptation to say that the law must always respect the dictates of conscience, but this cannot be right. As we have seen in the case of the intolerant, the legal order must regulate men's pursuit of their religious interests so as to realize the principle of equal liberty; and it may certainly forbid religious practices such as human sacrifice, to take an extreme case. Neither religiosity nor conscientiousness suffices to protect this practice. A theory of justice must work out from its own point of view how to treat those who dissent from it. The aim of a well-ordered society, or one in a state of near justice, is to preserve and strengthen the institutions of justice. If a religion is denied its full expression, it is presumably because it is in violation of the equal liberties of others. In general, the degree of tolerance accorded opposing moral conceptions depends upon the extent to which they can be allowed an equal place within a just system of liberty.

If pacifism is to be treated with respect and not merely tolerated, the explanation must be that it accords reasonably well with the principles of justice, the main exception arising from its attitude toward engaging in a just war (assuming here that in some situations wars of self-defense are justified). The political principles recognized by the community have a certain affinity with the doctrine the pacifist professes. There is a common abhorrence of war and the use of force, and a belief in the equal status of men as moral persons. And given the tendency of nations, particularly great powers, to engage in war unjustifiably and to set in motion the apparatus of the state to suppress dissent, the respect accorded to pacifism serves the purpose of alerting citizens to the wrongs that governments are prone to commit in their name. Even though his views are not altogether sound, the warnings and

protests that a pacifist is disposed to express may have the result that on balance the principles of justice are more rather than less secure. Pacifism as a natural departure from the correct doctrine conceivably compensates for the weakness of men in living up to their professions.

It should be noted that there is, of course, in actual situations no sharp distinction between civil disobedience and conscientious refusal. Moreover the same action (or sequence of actions) may have strong elements of both. While there are clear cases of each, the contrast between them is intended as a way of elucidating the interpretation of civil disobedience and its role in a democratic society. Given the nature of this way of acting as a special kind of political appeal, it is not usually justified until other steps have been taken within the legal framework. By contrast this requirement often fails in the obvious cases of legitimate conscientious refusal. In a free society no one may be compelled, as the early Christians were, to perform religious acts in violation of equal liberty, nor must a soldier comply with inherently evil commands while awaiting an appeal to higher authority. These remarks lead up to the question of justification.

57. THE JUSTIFICATION OF CIVIL DISOBEDIENCE

With these various distinctions in mind, I shall consider the circumstances under which civil disobedience is justified. For simplicity I shall limit the discussion to domestic institutions and so to injustices internal to a given society. The somewhat narrow nature of this restriction will be mitigated a bit by taking up the contrasting problem of conscientious refusal in connection with the moral law as it applies to war. I shall begin by setting out what seem to be reasonable conditions for engaging in civil disobedience, and then later connect these conditions more systematically with the place of civil disobedience in a state of near justice. Of course, the conditions enumerated should be taken as presumptions; no doubt there will be situations when they do not hold, and other arguments could be given for civil disobedience.

The first point concerns the kinds of wrongs that are appropri-

ate objects of civil disobedience. Now if one views such disobedience as a political act addressed to the sense of justice of the community, then it seems reasonable, other things equal, to limit it to instances of substantial and clear injustice, and preferably to those which obstruct the path to removing other injustices. For this reason there is a presumption in favor of restricting civil disobedience to serious infringements of the first principle of justice, the principle of equal liberty, and to blatant violations of the second part of the second principle, the principle of fair equality of opportunity. Of course, it is not always easy to tell whether these principles are satisfied. Still, if we think of them as guaranteeing the basic liberties, it is often clear that these freedoms are not being honored. After all, they impose certain strict requirements that must be visibly expressed in institutions. Thus when certain minorities are denied the right to vote or to hold office, or to own property and to move from place to place, or when certain religious groups are repressed and others denied various opportunities, these injustices may be obvious to all. They are publicly incorporated into the recognized practice, if not the letter, of social arrangements. The establishment of these wrongs does not presuppose an informed examination of institutional effects.

By contrast infractions of the difference principle are more difficult to ascertain. There is usually a wide range of conflicting yet rational opinion as to whether this principle is satisfied. The reason for this is that it applies primarily to economic and social institutions and policies. A choice among these depends upon theoretical and speculative beliefs as well as upon a wealth of statistical and other information, all of this seasoned with shrewd judgment and plain hunch. In view of the complexities of these questions, it is difficult to check the influence of self-interest and prejudice; and even if we can do this in our own case, it is another matter to convince others of our good faith. Thus unless tax laws, for example, are clearly designed to attack or to abridge a basic equal liberty, they should not normally be protested by civil disobedience. The appeal to the public's conception of justice is not sufficiently clear. The resolution of these issues is best left to the political process provided that the requisite equal liberties are

secure. In this case a reasonable compromise can presumably be reached. The violation of the principle of equal liberty is, then, the more appropriate object of civil disobedience. This principle defines the common status of equal citizenship in a constitutional regime and lies at the basis of the political order. When it is fully honored the presumption is that other injustices, while possibly persistent and significant, will not get out of hand.

A further condition for civil disobedience is the following. We may suppose that the normal appeals to the political majority have already been made in good faith and that they have failed. The legal means of redress have proved of no avail. Thus, for example, the existing political parties have shown themselves indifferent to the claims of the minority or have proved unwilling to accommodate them. Attempts to have the laws repealed have been ignored and legal protests and demonstrations have had no success. Since civil disobedience is a last resort, we should be sure that it is necessary. Note that it has not been said, however, that legal means have been exhausted. At any rate, further normal appeals can be repeated; free speech is always possible. But if past actions have shown the majority immovable or apathetic, further attempts may reasonably be thought fruitless, and a second condition for justified civil disobedience is met. This condition is, however, a presumption. Some cases may be so extreme that there may be no duty to use first only legal means of political opposition. If, for example, the legislature were to enact some outrageous violation of equal liberty, say by forbidding the religion of a weak and defenseless minority, we surely could not expect that sect to oppose the law by normal political procedures. Indeed, even civil disobedience might be much too mild, the majority having already convicted itself of wantonly unjust and overtly hostile aims.

The third and last condition I shall discuss can be rather complicated. It arises from the fact that while the two preceding conditions are often sufficient to justify civil disobedience, this is not always the case. In certain circumstances the natural duty of justice may require a certain restraint. We can see this as follows. If a certain minority is justified in engaging in civil disobedience, then any other minority in relevantly similar circumstances is likewise justified. Using the two previous conditions as the criteria

of relevantly similar circumstances, we can say that, other things equal, two minorities are similarly justified in resorting to civil disobedience if they have suffered for the same length of time from the same degree of injustice and if their equally sincere and normal political appeals have likewise been to no avail. It is conceivable, however, even if it is unlikely, that there should be many groups with an equally sound case (in the sense just defined) for being civilly disobedient; but that, if they were all to act in this way, serious disorder would follow which might well undermine the efficacy of the just constitution. I assume here that there is a limit on the extent to which civil disobedience can be engaged in without leading to a breakdown in the respect for law and the constitution, thereby setting in motion consequences unfortunate for all. There is also an upper bound on the ability of the public forum to handle such forms of dissent; the appeal that civilly disobedient groups wish to make can be distorted and their intention to appeal to the sense of justice of the majority lost sight of. For one or both of these reasons, the effectiveness of civil disobedience as a form of protest declines beyond a certain point; and those contemplating it must consider these constraints.

The ideal solution from a theoretical point of view calls for a cooperative political alliance of the minorities to regulate the overall level of dissent. For consider the nature of the situation: there are many groups each equally entitled to engage in civil disobedience. Moreover they all wish to exercise this right, equally strong in each case; but if they all do so, lasting injury may result to the just constitution to which they each recognize a natural duty of justice. Now when there are many equally strong claims which if taken together exceed what can be granted, some fair plan should be adopted so that all are equitably considered. In simple cases of claims to goods that are indivisible and fixed in number, some rotation or lottery scheme may be the fair solution when the number of equally valid claims is too great.[25] But this

25. For a discussion of the conditions when some fair arrangement is called for, see Kurt Baier, *The Moral Point of View* (Ithaca, N.Y., Cornell University Press, 1958), pp. 207–213; and David Lyons, *Forms and Limits of Utilitarianism* (Oxford, The Clarendon Press, 1965), pp. 160–176. Lyons gives an example of a fair rotation scheme and he also observes that (waiving costs of setting them

sort of device is completely unrealistic here. What seems called for is a political understanding among the minorities suffering from injustice. They can meet their duty to democratic institutions by coordinating their actions so that while each has an opportunity to exercise its right, the limits on the degree of civil disobedience are not exceeded. To be sure, an alliance of this sort is difficult to arrange; but with perceptive leadership, it does not appear impossible.

Certainly the situation envisaged is a special one, and it is quite possible that these sorts of considerations will not be a bar to justified civil disobedience. There are not likely to be many groups similarly entitled to engage in this form of dissent while at the same time recognizing a duty to a just constitution. One should note, however, that an injured minority is tempted to believe its claims as strong as those of any other; and therefore even if the reasons that different groups have for engaging in civil disobedience are not equally compelling, it is often wise to presume that their claims are indistinguishable. Adopting this maxim, the circumstance imagined seems more likely to happen. This kind of case is also instructive in showing that the exercise of the right to dissent, like the exercise of rights generally, is sometimes limited by others having the very same right. Everyone's exercising this right would have deleterious consequences for all, and some equitable plan is called for.

Suppose that in the light of the three conditions, one has a right to appeal one's case by civil disobedience. The injustice one protests is a clear violation of the liberties of equal citizenship, or of equality of opportunity, this violation having been more or less deliberate over an extended period of time in the face of normal political opposition, and any complications raised by the question of fairness are met. These conditions are not exhaustive; some allowance still has to be made for the possibility of injury to third parties, to the innocent, so to speak. But I assume that they cover

up) such fair procedures may be reasonably efficient. See pp. 169–171. I accept the conclusions of his account, including his contention that the notion of fairness cannot be explained by assimilating it to utility, pp. 176f. The earlier discussion by C. D. Broad, "On the Function of False Hypotheses in Ethics," *International Journal of Ethics*, vol. 26 (1916), esp. pp. 385–390, should also be noted here.

the main points. There is still, of course, the question whether it is wise or prudent to exercise this right. Having established the right, one is now free, as one is not before, to let these matters decide the issue. We may be acting within our rights but nevertheless unwisely if our conduct only serves to provoke the harsh retaliation of the majority. To be sure, in a state of near justice, vindictive repression of legitimate dissent is unlikely, but it is important that the action be properly designed to make an effective appeal to the wider community. Since civil disobedience is a mode of address taking place in the public forum, care must be taken to see that it is understood. Thus the exercise of the right to civil disobedience should, like any other right, be rationally framed to advance one's ends or the ends of those one wishes to assist. The theory of justice has nothing specific to say about these practical considerations. In any event questions of strategy and tactics depend upon the circumstances of each case. But the theory of justice should say at what point these matters are properly raised.

Now in this account of the justification of civil disobedience I have not mentioned the principle of fairness. The natural duty of justice is the primary basis of our political ties to a constitutional regime. As we noted before (§ 52), only the more favored members of society are likely to have a clear political obligation as opposed to a political duty. They are better situated to win public office and find it easier to take advantage of the political system. And having done so, they have acquired an obligation owed to citizens generally to uphold the just constitution. But members of subjected minorities, say, who have a strong case for civil disobedience will not generally have a political obligation of this sort. This does not mean, however, that the principle of fairness will not give rise to important obligations in their case.[26] For not only do many of the requirements of private life derive from this principle, but it comes into force when persons or groups come together for common political purposes. Just as we acquire obligations to others with whom we have joined in various private

26. For a discussion of these obligations, see Michael Walzer, *Obligations: Essays on Disobedience, War, and Citizenship* (Cambridge, Harvard University Press, 1970), ch. III.

associations, those who engage in political action assume obligatory ties to one another. Thus while the political obligation of dissenters to citizens generally is problematical, bonds of loyalty and fidelity still develop between them as they seek to advance their cause. In general, free association under a just constitution gives rise to obligations provided that the ends of the group are legitimate and its arrangements fair. This is as true of political as it is of other associations. These obligations are of immense significance and they constrain in many ways what individuals can do. But they are distinct from an obligation to comply with a just constitution. My discussion of civil disobedience is in terms of the duty of justice alone; a fuller view would note the place of these other requirements.

58. THE JUSTIFICATION OF CONSCIENTIOUS REFUSAL

In examining the justification of civil disobedience I assumed for simplicity that the laws and policies protested concerned domestic affairs. It is natural to ask how the theory of political duty applies to foreign policy. Now in order to do this it is necessary to extend the theory of justice to the law of nations. I shall try to indicate how this can be done. To fix ideas I shall consider briefly the justification of conscientious refusal to engage in certain acts of war, or to serve in the armed forces. I assume that this refusal is based upon political and not upon religious or other principles; that is, the principles cited by way of justification are those of the conception of justice underlying the constitution. Our problem, then, is to relate the just political principles regulating the conduct of states to the contract doctrine and to explain the moral basis of the law of nations from this point of view.

Let us assume that we have already derived the principles of justice as these apply to societies as units and to the basic structure. Imagine also that the various principles of natural duty and of obligation that apply to individuals have been adopted. Thus the persons in the original position have agreed to the principles